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Supreme Court of the United States

OCTOBER TERM, 1969

No. 1386

DONALD J. MILLER,

Petitioner,

v.

NEW YORK STOCK EXCHANGE, AMERICAN STOCK EXCHANGE, PAINE, WEBBER, JACKSON & CURTIS and LOUIS LEFKOWITZ, Individually and as Attorney General of the State of New York,

Respondents.

BRIEF OF RESPONDENT NEW YORK STOCK EXCHANGE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Has any substantial federal question of constitutionality been presented with respect to a state statute requiring fingerprinting of persons employed in the securities business, which is admittedly a business affected with a vital public interest?

Statement of the Case

Petitioner, a lawyer formerly employed by respondent Paine, Webber, Jackson & Curtis, sued to obtain declaratory and injunctive relief against the operation of Chapter 1071, 1969 Laws of New York, New York General Business Law § 359-e(12) (hereinafter "the Statute"). As it per-

tains to petitioner, the Statute requires all New York employees of member firms of a national security exchange to be fingerprinted as a condition of employment. Petitioner contends that the Statute constitutes an invasion of privacy, an unlawful search and seizure and denial of due process of law and equal protection of the laws. Respondents opposed petitioner's motion to convene a three-judge court pursuant to 28 U.S.C. § 2280, and moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

The District Court for the Southern District of New York (Weinfeld, J.) denied petitioner's motion to convene a three-judge court and granted respondents' motion to dismiss the complaint (App. 27-48), and the Court of Appeals for the Second Circuit unanimously affirmed in a *per curiam* decision (App. 23-26).

Reasons for Denying the Writ

I

The courts below correctly held that the Statute constitutes a valid exercise of the police power.

When the constitutionality of any given exercise of a state's police power is challenged, only two questions arise: (1) Does the state have a legitimate interest in the matter subject to regulation? (2) Are the means chosen reasonably related to the purposes sought to be achieved by the regulation? *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594-95 (1962).

A legislative enactment pursuant to the police power carries a strong presumption of constitutionality, and is presumed to be supported by facts known to the Legislature. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938); *South Carolina Highway Department* v. *Barnwell Brothers*, 303 U.S. 177, 191 (1938); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509-510 (1937).

The function of the Courts is not to second-guess the Legislature on questions of the reasonableness, wisdom and propriety of regulatory legislation. *South Carolina Highway Department* v. *Barnwell Brothers, supra,* at p. 191; *Olsen* v. *Nebraska,* 313 U.S. 236, 246 (1941). The Courts may not substitute their judgment for that of the Legislature where there exists "any state of facts either known or which could reasonably be assumed" to support the action taken by the Legislature. *United States* v. *Carolene Products Co., supra,* at p. 154; *Borden's Co.* v. *Ten Eyck,* 297 U.S. 251, 263 (1934).

The Statute represents a reasonable exercise of the police power by the Legislature of the State of New York. The facts respecting the problem of theft in the securities industry, the efforts to deal with the problem by members of the industry and the purpose of the Statute are reviewed at length in what the Court of Appeals described as "Judge Weinfeld's thorough and well-considered opinion" and need not be repeated. Suffice it to say that the incidence of lost and stolen securities has increased dramatically in recent years, amounting to over $70,000,000 during 1967-1968 alone. Early in 1969 the New York Stock Exchange and other financial institutions formed a Joint Bank-Securities Industry Committee on Securities Protection to analyze the problem and make recommendations. The Statute was one of the recommendations of that Committee. The overall purpose of the Statute is to prevent theft and similar crimes in the securities industry and to render more difficult industry infiltration by elements of organized crime and by persons whose criminal records demonstrate sufficient unreliability to justify denial of their employment in the industry.

It is not, and cannot be, disputed that the securities industry is affected with a public interest, that there has developed a serious problem of lost and stolen securities in recent years and that the State of New York has a vital interest in taking steps reasonably designed to protect the

industry from crime. Obviously, one such step is to prevent the infiltration of the industry by persons whose criminal records demonstrate their unfitness for such employment. Under Federal law and the rules of the New York Stock Exchange employees or prospective employees of member firms of national security exchanges are presently required to disclose any criminal record (SEC Rule 17(a)-3(a)(12), 17 C. F. R. § 240.172-3(a)(12); N. Y. S. E. Rule 345.19). The Statute does no more than provide a simple and unobtrusive means to verify this information. As stated by Judge Weinfeld (App. 34-35):

> "Fingerprints have long been recognized as a scientific and accurate means of identification. The statute provides a simple method for security industry employers confronted with the problem of shifting personnel and mounting crime to verify at slight inconvenience to employees and applicants for employment the information submitted by them. Upon its face, it appears reasonably calculated to meet the evils toward which it was directed without imposing any undue burden upon individuals, and consequently represents a valid exercise of the state's police power." (Footnotes omitted)

Petitioner's contentions that the Statute is ineffective to accomplish its purpose and that there are alternate means of deterring or preventing loss and theft of securities raise questions for consideration and evaluation by the Legislature, and not by the courts or a particular litigant.

II

Fingerprinting as a condition of employment does not infringe upon any constitutional right.

Petitioner argues that the Statute is not a proper exercise of the police power because the requirement of fingerprinting in the securities industry is an unconstitutional invasion of the "right of privacy" under the Fourth

Amendment, a denial of equal protection of the laws and a denial of due process of law. These contentions are all based upon *Davis* v. *Mississippi*, 394 U. S. 721 (1969) and upon the premise that *Davis* established a constitutionally-protected right of privacy not to be fingerprinted except upon probable cause under the Fourth Amendment. Petitioner's reliance on the *Davis* case is misplaced because (1) it does not establish any right of privacy in the person's fingerprints and (2) it involved a detention and arrest in connection with a criminal investigation.

In *Davis* the police arrested or detained a group of youths, including petitioner, and fingerprinted them in order to find fingerprints matching those at the scene of a crime. Thereafter petitioner was again arrested without a warrant or probable cause, and again fingerprinted. After being identified by the latter fingerprints as the perpetrator of the crime, petitioner was tried and convicted. This Court reversed the conviction on the ground that petitioner's detention by the police for any purpose without probable cause constituted an unlawful search and seizure under the Fourth Amendment.

Contrary to petitioner's argument in this case, this Court in *Davis* did not declare any rule or principle that there exists a constitutionally-protected right of privacy in a person's fingerprints. It is clear that the Court was concerned not with the fingerprinting *per se*, but with the obtaining of evidence during improper detention. Thus, the Court stated that the only issue was whether petitioner's fingerprints should have been excluded from evidence "as the product of a detention which was illegal under the Fourth and Fourteenth Amendments" (394 U. S. at 722), *i.e.*, "whether the detention of petitioner during which the fingerprints used at trial were taken constituted an unreasonable seizure of his person in violation of the Fourth Amendment" (394 U. S. at 724-5). Noting that the purpose of the Fourth Amendment was to prevent wholesale

intrusions on the security of citizens "whether these intrusions be termed 'arrests' or 'investigatory detentions'" (394 U. S. at 726-7), and that "Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment" (394 U. S. at 727), the Court held that petitioner's arrest and subsequent detention were without warrant or probable cause and "were therefore constitutionally invalid" (394 U. S. at 725). The vice requiring reversal was not the fact that Davis was fingerprinted, but the fact that his arrest and detention were illegal, rendering inadmissible evidence (the fingerprints) obtained as a result thereof. The Court clearly did not recognize any right of privacy in a person's fingerprints, and in fact, explicitly left open the question whether, under some circumstances, the police might obtain the fingerprints of individuals for whom there is no probable cause to arrest without violating the Fourth Amendment (394 U. S. at 727-8).

The other cases cited in support of petitioner's Fourth Amendment contention are equally inapposite. *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), involved searches of private dwellings to find violations of housing or health laws and *James* v. *Goldberg,* 303 F.Supp. 935 (S.D.N.Y. 1969), concerned warrantless visits to homes of welfare recipients. Clearly the matters dealt with in such cases are in no way related, or even analogous, to the issues presented in this case. The Statute is simply intended to provide a means of verifying information required by law to be furnished by persons employed or seeking employment in the securities industry. The purpose of such requirements is not connected with the initiation or prosecution of criminal or enforcement proceedings, which is the concern of the search and seizure provision of the Fourth Amendment.

The requirement that a person submit his fingerprints as a condition of voluntary employment does not constitute a "search and seizure" under the Fourth Amendment. Virtually every employer requires a prospective employee

to furnish certain information concerning himself and his background, including such matters as his name, employment history, criminal record, family, residence, personal references, signature and the like. The eliciting of such information from one engaged in or seeking employment has never been considered a "search and seizure" under the Fourth Amendment. The fingerprinting requirement of the Statute is indistinguishable in purpose and effect from the requirement that an applicant furnish such other information, except that it is more reliable—a person can lie about his criminal record, but his fingerprints cannot. It is also more economical, less burdensome for employer and employee alike and far less an imposition on the employee's privacy than a full background investigation.

Petitioner's contentions based upon the fact that the Statute does not provide for the return of an employee's fingerprints are fully answered in Judge Weinfeld's opinion (App. 42-45). We might simply add that petitioner's position in this regard is based upon the untenable premises that there is a right of privacy in fingerprints and that fingerprinting is an unconstitutional search and seizure absent probable cause under the Fourth Amendment. It has never been held or even suggested that an employee has a constitutional right to the return of other information furnished to an employer as a condition of employment, and no reason appears why fingerprints should be treated differently. Nor are petitioner's contentions respecting restriction of the class to be fingerprinted or showing of need for fingerprinting (Petition 12-15) relevant to the constitutional issues. The necessity for legislation and the class of persons to be covered thereby are matters for the consideration of the Legislature.

Petitioner's other constitutional arguments may be dealt with briefly. The claim that fingerprinting employees in the securities industry constitutes an "invidious and irrational" discrimination (Petition 16) and therefore amounts to a denial of equal protection under the law approaches

the ridiculous when one considers the widespread use of fingerprinting today. Compulsory fingerprinting as a condition of employment or for purposes of identification, wholly unrelated to criminal proceedings, is a commonplace fact of life. The list of occupations which have been subjected to a fingerprinting requirement under federal, state or local statutes, ordinances and administrative orders is amazingly extensive. See Judge Weinfeld's opinion at App. 38-39, 46-48 (a portion of the appendix to Judge Weinfeld's opinion, listing state and federal fingerprinting requirements, was inadvertently omitted from the Appendix to the Petition; see 306 F.Supp. at 1013).

Petitioner's argument that the Statute denies him due process of law (Petition 16-19) appears to be, in substance, that the Statute is unreasonably broad and that there are alternative means to prevent theft in the securities industry. As already noted, these are considerations for the Legislature, not the courts. Moreover, the argument is based on the presumption that there exists a constitutionally-protected right of privacy in fingerprints, a contention which is untenable for the reasons above stated.

III

The judgment below does not conflict with the decisions of this or any other court, nor does it raise any issue meriting review by this Court.

Davis v. *Mississippi, supra,* upon which all of petitioner's constitutional arguments are based, does not support the novel proposition that there exists a constitutionally-protected right of privacy in fingerprints or that fingerprinting *per se* constitutes a search and seizure under the Fourth Amendment. Petitioner has not cited any decision of this Court with which the judgment below conflicts, and this respondent is unaware of any decision supporting petitioner's position. On the contrary, statutes requiring fingerprinting of employees in various industries affected

with a public interest have been upheld in numerous decisions, of both state and federal courts, cited and discussed in Judge Weinfeld's opinion (App. 36-38, footnotes, 17, 19). As is fully established in Judge Weinfeld's opinion, petitioner's claims that the Statute infringes upon his constitutional rights are wholly without merit.

Since the complaint fails to raise any substantial constitutional issue, the decision of the District Court dismissing the action, unanimously affirmed by the Court of Appeals, was correct. *Ex Parte Poresky,* 290 U.S. 30 (1933).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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